CUBBINS *v.* MISSISSIPPI RIVER COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

No. 299. Argued April 24, 1916.—Decided June 5, 1916.

Quære, Whether a suit against the members of the Mississippi River Commission to enjoin them from constructing levees is not really a suit against the United States of which the courts have no jurisdiction without its consent.

An owner of land fronting on the Mississippi River has no right to

accidental and extraordinary condition, were entitled to the enjoyment of the common right to construct works for their own protection.

Demolombe after commenting upon Article 640 of the Code Napoleon generally dealing with the servitudes arising from the flow of water, and pointing out that under the Roman law as well as under the ancient French law and the Code Napoleon it was the duty of proprietors whose lands bordered upon or were traversed by rivers to permit the water of such rivers to flow their natural course unimpeded and quoting the Roman law, "*fluminis naturalem cursum non avertere*" (L. 1, Cod. de Alluvionibus), additionally states that under both the Roman and ancient law and under the Code Napoleon such proprietors were bound "to undertake to do no work the result of which would be to change the direction of the stream or enlarge its bed or to injure in any manner other proprietors whose lands border upon or are traversed by the stream," (Demolombe, vol. 11, No. 30, p. 36). But the author at once proceeds to add that the principles thus stated in no way serve to prevent or to limit the right of proprietors whose lands border on or are traversed by rivers "from guaranteeing themselves against damage by defensive works constructed either upon the border of the rivers or in the interior of their property against either the permanent and insensible action of the rivers or streams or particularly against the damage caused by the accidental or extraordinary overflow of their banks; '*Ripam suam adversus rapidi amnis impetum munire prohibitum non est.*' (L. 1 Cod de Alluv.)" And proceeding, the author states that this right of the proprietors undoubtedly exists "even when the effect of the dykes or other works done will be, as is nearly always the case, to render the waters of the river more hostile and damaging to other properties, the owners of which would have no cause of complaint because each one is entitled to do the same in his own behalf,

as the right of preservation and of legitimate defense is reciprocal since it is impossible to conceive that the law would impose upon the proprietors bordering upon streams an obligation to suffer their property to be devoured [by accidental or extraordinary overflows] without the power on their part to do anything to protect themselves against the disaster." Proceeding to elucidate and state the limitations by which the right thus universally recognized is safeguarded, the author says: "It is necessary, however, that the works constructed [for the purposes stated] do not encroach upon the natural bed of the water courses, that they should be of course constructed in conformity to the police regulations, if any exist, and finally that they are in fact constructed by those who build them for the defense of their own property, because constructions would not be tolerated which had been erected by a proprietor upon his own land without any necessity whatever for his own protection, but with the only and disloyal purpose of injuring the property of others." Demolombe further states: "What I have just said of streams and rivers is equally applicable to accidental torrents of water which like avalanches may sometimes precipitate themselves upon certain properties. Such a case is likewise one of *vis major* against which each one has a right by the natural law on his own behalf to seek to protect himself as best he may,—a right which, as well said by the Court of Aix is like that which obtains to resist the incursion of an enemy, without being preoccupied as to what may be the result or the wrong suffered by a neighbor who may not have had the foresight to successfully avoid the disaster." The author then proceeds: "These principles which are sustained both by reason and by conceptions of equity, have been for all time recognized both in the Roman law and in our ancient French jurisprudence. They are to-day supported by the unanimous accord of the decided cases and of the opinions of authors (comp. L. 2,

§ 9, ff. *de aqua de aquae;* L. unic., ff. *de ripa munienda;* L. 1, ff. *ne quid in flum. publ.;* Coepolla, tract. 2 cap. XXXVIII, n° 2; Troncon, sur l'art. 225 de la cout. de Paris; Henrys, liv. IV, tit. II, quaest. 75; Domat, Lois civiles, liv. II, tit. VIII, sec. III, n° 9; Aix, 19 mai, 1813, Raousset, Sirey, 1814, II, 9; Duranton, t. V, n° 162; Pardessus, t. I, n° 92; Garnier, t. III, n° 677; Daviel, t. I, n^{os} 384–386, et t. II, n^{os} 697, 698; Taulier, t. II, p. 361).

See *Mailhot* v. *Pugh,* 30 La. Ann. 1359, where some of the authors referred to by Demolombe and others are quoted and one or more of the adjudged French cases enforcing the limitation are stated and commented upon.

That the general right to an unrestrained flow of rivers and streams and the duty not to unduly deflect or change the same by works constructed for individual benefit as qualified by the limitation as to accidental and extraordinary floods which prevailed in Rome and on the Continent and which to-day govern in France as stated by Demolombe, also obtained in Scotland, was recognized in 1741 in the case of *Farquharson* v. *Farquharson,* Morr. Dic. 12,779. And the character of the limitation of the rule is well illustrated by *Menzies* v. *Breadalbane,* 3 Bligh, (N. S.) 414, (H. L.), where it was held that it did not apply to a case where a structure was erected in the established high water channel of a stream. It is apparent also from the opinions in *Nield* v. *London and Northwestern Ry.,* L. R. 10 Ex. 4; 44 L. J. Ex. 15; and the statement found in Coulson on the Law of Waters (3rd Ed.), pages 177 *et seq.,* that the limitation as to accidental and extraordinary overflows likewise exists in England.

In this country it is also certain without going into a review of decided cases that the limitation is recognized, though it is true to say that much contrariety and confusion exist in the adjudged cases as to when it is applicable, some cases extending the rule so far as to virtually render the limitation inoperative, others extending the

limitation to such a degree as really to cause it to abrogate the rule itself. But into these differences and contrarieties it is not at all necessary to enter, since there is no decided case, whatever may be the difference as to the application of the limitation, holding that it does not exist, and when in fact the very statement of the general rule requires it to be determined whether that rule as correctly stated would include situations which the limitation if recognized would exclude. We place in the margin a few of the many adjudged cases from which the situation just stated will be made manifest.[1]

Were the overflows in this case accidental and extraordinary, is then the proposition to which the case reduces itself. That the volume of water from the vast watershed which the Mississippi River drains and which by means of percolation and tributaries reach that river, is susceptible now and again of being so simultaneously drained off from the watershed into the river and thus so vastly increasing the amount of water to be carried off in a given time as to cause the overflow of the valley which the river traverses and to thereby endanger the enormous interests concerned, is too well known to require anything but statement. But that the possibilities of such a result do not when such overflows occur cause them to be not accidental is to say the least persuasively established by the ruling in *Viterbo* v. *Friedlander*, 120 U. S. 707. And leaving aside this view, it is obvious from the situation and the causes which in the nature of things may accidentally bring about the emptying into the river at one and the same time of the volumes of water from all the vast sources of supply which drain the expansive watershed

[1] *Burwell* v. *Hobson*, 12 Gratt. (Va. 322); *Cairo &c. R. R.* v. *Brevoort*, 62 Fed. Rep. 129; *Crawford* v. *Rambo*, 44 Oh. St. 279; *O'Connell* v. *East Tennessee &c. R. R.*, 87 Georgia, 246; *Taylor* v. *Fickas*, 64 Indiana, 167; *Shelbyville Turnpike* v. *Green*, 99 Indiana, 205; *Mailhot* v. *Pugh*, 30 La. Ann. 1359.

into the river, in the absence of which accidental unison there could be no flood, that the accidental character of the unity of the conditions upon which the flood depends serves to affix that character to the result—the flood itself. But assuming, as we think it must be assumed, that the words accidental and extraordinary are to be taken as relating to the river, that is, as alone embracing conditions not usually there occurring and not ordinary to the stream in its usual condition having regard to the flow through its natural bed, whether in high or low water, that view would be here irrelevant, since there is no suggestion of any bed of the river in high or low water except the space between the natural banks along which the levees were built unless the whole valley be considered as such bed. Indeed from the face of the bill it is apparent that the rights relied upon were assumed to exist upon the theory that the valley through which the river travels, in all its length and vast expanse, with its great population, its farms, its villages, its town, its cities, its schools, its colleges, its universities, its manufactories, its network of railroads—some of them transcontinental, are virtually to be considered from a legal point of view as constituting merely the high water bed of the river and therefore subject, without any power to protect, to be submitted to the destruction resulting from the overflow by the river of its natural banks. In fact the nature of the assumption upon which the argument rests, is shown by the contention that the building of the levees under the circumstances disclosed was a work not of preservation but of reclamation, that is, a work not to keep the water within the bed of the river for the purpose of preventing destruction to the valley lying beyond its bed and banks, but to reclaim all the vast area of the valley from the peril to which it was subjected by being situated in the high water bed of the river. If it were necessary to say anything more to demonstrate the unsoundness of this view,

it would suffice to point out that the assumption is wholly irreconcilable with the settlement and development of the valley of the river, that it is at war with the action of all the state governments having authority over the territory, and is a complete denial of the legislative reasons which necessarily were involved in the action of Congress creating the Mississippi River Commission and appropriating millions of dollars to improve the river by building levees along the banks in order to confine the waters of the river within its natural banks, and by increasing the volume of water to improve the navigable capacity of the river.

2. Although in view of the conclusion just stated it is unnecessary to refer to the power of Congress to build the levees under the paramount authority vested in it to improve the navigation of the river, we cannot fail to point out the complete demonstration which that power affords of all want of legal responsibility to the complainant for the building of the levees complained of. In this connection it is to be observed that the complete application of this power is in the reason of things admitted by the erroneous assumption upon which alone the arguments proceed in seeking to avoid the effect of the well defined limitation as to accidental and extraordinary floods, that is, the erroneous contention as to the high water bed of the river which we have disposed of. We say this since it is apparent that if the property in the valley were to be treated as in the bed of the river, that would be true also of the property of the complainant, hence causing it to come to pass that as to such property so situated there would be no possible lawful ground of complaint to arise from the action of Congress in exerting its lawful power over the bed of the river for the improvement of navigation.

These conclusions dispose of the case without the necessity of recurring, as we proposed at the outset to do,

to the rulings in the *Jackson* and *Hughes Case* (230 U. S. 1, *Id.* 24), but in the light of the principles we have stated, we direct attention to the fact that the attempt to distinguish the *Jackson Case* upon the ground that relief was there denied because the proprietor on one side of the river, who complained of the increase of the flood level and injury to his land from the levees erected on the other side or from the levee system as a whole, had himself erected a levee to protect his property and therefore was estopped, is without foundation. It is plain when the context of the opinion in the *Jackson Case* is considered that the denial of the right to relief in that case was rested not upon the conception that a right existing on one side of the river was destroyed by estoppel and a right not existing on the other was conferred by the same principle, but upon the broad ground that the rights of both owners on either side embraced the authority without giving rise to legal injury to the other, to protect themselves from the harm to result from the accidental and extraordinary floods occurring in the river by building levees if they so desired. Additionally when the principle laid down in the *Jackson Case* is illustrated by the ruling which was made in the *Hughes Case*, it becomes apparent that the contention here urged as to the identity between the great valley and the flood bed of the river was adversely disposed of, since under no view could the ruling in the *Hughes Case* have been made except upon the theory that the bank of the river was where it was found and did not extend over a vast and imaginary area.

Affirmed.

MR. JUSTICE PITNEY concurs in the result.